

[Human Resources - Merit Commission legal representation]

Opinion No. 99-005

Mr. Shawn H. Nau, Director
Maricopa County Department of Human Resources
301 West Jefferson, 2nd Floor
Phoenix, Arizona 85003

July 22, 1999

SYLLABUS:

No county department other than the County Attorney's Office may employ persons for the purpose of providing legal representation on behalf of the county before the Merit System Commission or the Law Enforcement Merit System Commission.

Dear Mr. Nau:

You have requested a legal opinion addressing whether a county department may designate one of its employees to defend the department in an appeal brought by an employee to the Maricopa County Merit System Commission or the Maricopa County Law Enforcement Merit Commission.

Our opinion is that a department cannot, through a designated employee of the department, represent itself in such an appeal. Such representation constitutes the practice of law, and there is no department in county government which can, through its employees, engage in the practice of law on behalf of the county, other than the County Attorney's Office.

Before we examine the legal issues raised in your request, it is useful to review the typical scope of activities undertaken by someone who represents another in a personnel matter before one of the merit system commissions. Representation normally includes:

- review of the factual history relevant to the employment action;
- analysis of the relevant law;
- preparation of legal memoranda for the hearing officer;
- preparation of testimony and documents to be admitted into evidence;
- appearance at the hearing and presentation of evidence, cross examination of testimony presented by the adverse party, objections to evidence offered by the adverse party based on lack of relevance, privilege, and other legal grounds, and a summation or oral argument to the hearing officer.

The Arizona Supreme Court has definitively held that the range of activities described above constitutes the practice of law. In *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961) the Supreme Court held that the practice of law includes "the

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preparation for another of matters for court, administrative agencies and other judicial or quasi judicial bodies and officials as well as the acts of representation of another before such a body or officer.” The Supreme Court has also held that determination of what may constitute the practice of law is a judicial issue to be determined by courts, not legislative determinations to be addressed in statutes. *Hunt v. Maricopa County Employees Merit System Commission*, 127 Ariz. 259, at 262, 619 P.2d 1036, 1039 (1980).

In addition, Rule 31(a)(3) of the Rules of the Supreme Court prohibits a person from the practice of law unless the person is an active member of the state bar. 17A A.R.S. Sup.Ct.Rules, Rule 31(a)(3). Interestingly, the Supreme Court has provided an exemption from Rule 31(a)(3) which pertains to representation before a board hearing concerning personnel matters. Rule 31(a)(4)(B) permits **an employee** to “represent himself or designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged....” 17A A.R.S. Sup.Ct.Rules, Rule 31(a)(4)(B). This exemption does not extend so far as to provide for representation of the employer in such hearings.

We therefore conclude that an appearance on behalf of a county department before one of the merit system commissions constitutes the practice of law, and must be done only by an attorney in good standing with the state bar.

The next issue is: If the employee designated to conduct the representation is a member in good standing with the state bar, could the employee make an appearance before one of the merit system commissions on behalf of a county department? Although such representation does not raise issues related to the unauthorized practice of law, under Rule 31, as discussed above, it does raise issues specific to representation of the county.

Under state law, the County Attorney is empowered and mandated to provide legal representation to the county. A.R.S. § 11-532(A) provides, in relevant part:

The county attorney ... shall:

- ...
7. When required, give his written opinion to county officers on matters relating to the duties of their offices.
- ...
9. Act as the legal advisor to the board of supervisors, attend their meetings and oppose claims against the county which he deems unjust or illegal.

The Arizona Supreme Court relied on these provisions in *Board of Supervisors of Maricopa*

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County v. Woodall, 120 Ariz. 379, 586 P.2d 628 (1978), and concluded that the Board of Supervisors has no authority to employ private counsel to advise the board and other county officers and employees. The court held:

The Constitution of Arizona created the Office of County Attorney and the statute prescribes the duties attached thereto. Public funds may not be expended for the purpose of performing the duties which are imposed upon the County Attorney, and the contracts of employment by which "in house lawyers" are engaged to perform duties with which the County Attorney is charged are ultra vires and void.

Woodall, at 631.

Under the *Woodall* decision, no county officer or department can employ legal counsel to perform the duties prescribed by law to the County Attorney. Those duties encompass legal advice to the county and legal defense of claims against the county, including typical claims for relief from an employment action brought before one of the merit system commissions. We therefore conclude that no county department other than the County Attorney's Office may employ persons for the purpose of providing representation to the county or any of its departments before the Merit System Commission.¹

¹We are advised that the genesis of your request for this opinion is a recent letter from the Sheriff's Office indicating that consideration would be given on a case by case basis whether the Sheriff would request representation from the County Attorney's Office or represent itself at employee appeal hearings. We note that as to the Sheriff's Office, there is a specific prohibition against the practice of law, in A.R.S. § 11-403(A), which provides: "The sheriff and constable and their deputies are prohibited from practicing law, or forming a partnership with an attorney-at-law." While not dispositive of the issues raised in your request, this statute is consistent with the conclusion expressed in this opinion that an employee of that department is precluded from activities which constitute the practice of law.

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Sincerely,

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

Jean Rice
Assistant Chief Counsel
Division of County Counsel

cc: All Maricopa County elected officials and department heads
Maricopa County Manager

Approved by the Opinion Review
Committee of the Maricopa County
Attorney's Office this ____ day of
July, 1999.